

January 9, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28

Dear Chairman Wheeler:

The undersigned trade associations representing small broadband providers respectfully request that, before a draft order in the Open Internet proceeding is circulated to the Commissioners, the Federal Communications Commission (“FCC” or “Commission”) conduct an *en banc* hearing to examine the significant economic impact of its proposals on small broadband providers.¹ Such an examination, which the Commission is required to conduct, was absent from the *NPRM* and its accompanying Initial Regulatory Flexibility Analysis (“*IRFA*”). To address this concern, the Commission should hear directly from small broadband providers about the effects of a new regulatory regime for broadband Internet access services, and take steps to ameliorate the significant adverse economic consequences before adoption of the order.²

You recently stated that you have a “unique appreciation for the entrepreneurial spirit of America’s small business owners.”³ Small broadband providers have no less an entrepreneurial spirit, particularly since they are likely to provide services where larger incumbents do not, serving unserved and underserved communities in rural, suburban and urban areas. Moreover, small broadband providers serve *both* residential and small business consumers, the very small businesses that you recognize are a “key driver of job creation and economic growth . . . the foundation of local economies across America – from Missouri’s countryside to the neighborhoods of Manhattan.”⁴

The Regulatory Flexibility Act, as amended (“RFA”), mandates that the FCC, at the notice of proposed rulemaking stage, provide a description of the “projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of

¹ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61, 29 FCC Rcd 5561 (2014) (“*NPRM*”).

² The *IRFA* was appended as Appendix B to the *NPRM*.

³ *Is the FCC Responding to the Needs of Small Business and Rural America: Hearings Before the House Comm. on Small Business*, 113th Cong. (2014) (statement of FCC Chairman Tom Wheeler).

⁴ *Id.*

the classes of small entities which will be subject to the requirement,”⁵ and to provide a “description of any significant alternatives to its proposed rule which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact ... on small entities.”⁶ In adopting the RFA, Congress recognized that one-sized regulations do not fit all, particularly when small businesses were not the source of the reason for regulatory action,⁷ and that an agency’s “failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity.”⁸

Both the *NPRM* and the *IRFA* significantly understate, if not ignore completely, the significant impact of the FCC’s proposed rules on small business providers and the communities in which they serve. Each of the undersigned trade associations commented on the *IRFA*, pointing out this shortcoming,⁹ and each filed substantive comments addressing the significant impact of the FCC’s proposals in this proceeding on their small members.¹⁰ However, these comments appear to have been lost in the shuffle in the debate over the appropriate legal basis for the rules. For instance, although the Commission conducted several roundtables, none of these focused on issues specific and unique to small broadband providers and the small businesses they serve.¹¹ Given the magnitude of the regulatory changes proposed in this

⁵ 5 U.S.C. § 603(b)(4).

⁶ 5 U.S.C. § 603(c).

⁷ 5 U.S.C. § 601 *et seq.*, Congressional Findings and Declaration of Purpose, (a)(2) (“laws and regulations designed for application to large scale entities have been applied uniformly to small businesses...even though the problems that gave rise to government action may not have been caused by those smaller entities”) (“RFA Congressional Findings and Declaration of Purpose”).

⁸ *Id.* (a)(4).

⁹ See Regulatory Flexibility Act Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28 (filed July 15, 2014) (“NCTA IRFA Comments”); and Comments of WISPA Regarding the Initial Regulatory Flexibility Analysis, GN Docket No. 14-28 (filed July 16, 2014) (“WISPA IRFA Comments”). Although ACA did not file separate *IRFA* Comments, its general Comments addressed a non-compliant *IRFA*. See Comments of the American Cable Association, GN Docket No. 14-28 (filed July 17, 2014) (“ACA Comments”), at 32 n.79; see also Reply Comments of WISPA, GN Docket No. 14-28 (filed Sept. 15, 2014) (“WISPA Reply Comments”), at 3-6 (summarizing *IRFA* comments).

¹⁰ See ACA Comments; Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28 (filed July 15, 2014); Comments of WISPA, GN Docket No. 14-28 (filed July 16, 2014); and WISPA Reply Comments..

¹¹ Additionally, Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, “requires agencies to take additional specific steps to demonstrate that they are

proceeding and the deficient analysis of the impact of such changes on small broadband providers, it is critical that the FCC supplement the administrative record to specifically address small business broadband provider issues.

The RFA compels the FCC to conduct additional outreach to small businesses significantly impacted by the FCC's proposed rules.¹² We can think of no recent proceeding or issue in which the FCC would be more greatly aided by additional public comment on the record.¹³ A number of parties, including the Office of Advocacy of the U.S. Small Business Administration, previously have requested that the FCC conduct a supplemental IRFA to address the major shortcomings of the *IRFA* and *NPRM*, yet the Commission failed to act on that request or take any other action to engage with small broadband providers.¹⁴ The *en banc* hearing we now request would provide you and your fellow Commissioners the opportunity to hear directly from the small companies whose businesses would be most affected by the regulations now under consideration, and could likely be put together relatively quickly.

considering small entities in their rulemakings.” *Report on the Regulatory Flexibility Act FY 2013*, Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act and Executive Order 13272 (Feb. 2014), at i; *see also* Presidential Memorandum of January 18, 2011, *Regulatory Flexibility, Small Business, and Job Creation*, Memorandum for the Heads of Executive Departments and Agencies, 76 Fed. Reg. 3827, 3828 (Jan. 21, 2011) (when initiating a rulemaking give “serious consideration to whether and how it is appropriate, consistent with law and regulatory objectives, to reduce regulatory burdens on small businesses, through increased flexibility”) (“Presidential Memorandum”). The Presidential Memorandum was issued concurrently with Executive Order 13563, which reinforced the importance of compliance with the RFA for all federal agencies. 76 Fed. Reg. 3821 (Jan. 21, 2011). President Obama issued subsequent Executive Order 13579 that expressly imposed the obligations of Executive Order 13563 on independent regulatory agencies. 76 Fed. Reg. 41587, § 1(c) (July 14, 2011) (“Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.”).

¹² 5 U.S.C. § 609(a)(4) (allowing for the conduct of open conferences or public hearings).

¹³ *See FCC Announces Series of Open Internet Roundtable Discussions*, Public Notice, GN Docket No. 14-28, DA 14-1152 (rel. Aug. 8, 2014) (“The Commission may subsequently schedule additional roundtable events in this series”).

¹⁴ Ex Parte Letter from Winslow L. Sargeant, Ph.D., Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to FCC (Sept. 25, 2014) (“If the FCC does not have the data it needs to complete a thorough [Final Regulatory Flexibility Analysis], it should publish a supplemental IRFA for an abbreviated comment period limited to comments regarding the analysis”); *see also* WISPA IRFA Comments at 1, 10.

The proposal of the most concern and potential significant negative impact on small broadband providers – whether wireline and wireless, fixed or mobile – is the FCC’s proposal to regulate information services under Title II. However, there is no discussion in the *NPRM* nor *IRFA* of the major changes that a Title II regulatory scheme will impose on small broadband providers.¹⁵ Nor is there any discussion of the compounded impact of Title II *in addition* to the other regulatory changes under consideration by the FCC, such as the proposed changes to the disclosure obligations.¹⁶ The net effect of the regulations under consideration is certain to result in substantial new burdens on small broadband providers, a result directly at odds with the requirement in Section 257 of the Communications Act of 1934, as amended, that the FCC identify and eliminate market entry barriers for small businesses.¹⁷

It is simply improper for the FCC to apply the same rules to thousands of smaller broadband providers without considering the impact on their ability to continue providing service in rural and smaller markets. The *NPRM* does not include any evidence that broadband providers, let alone small broadband providers, currently offer service in a manner that jeopardizes the openness of the Internet or that they could do so in the future. Given the absence of any threat posed by small providers, the Commission should give full consideration to the concerns of small business owners before moving forward with any new regulatory mandates.

¹⁵ See e.g., NCTA IRFA Comments, at 3.

¹⁶ See *NPRM*, at paras. 68-83.

¹⁷ 47 U.S.C. § 257(c). The market entry barriers inherent in this proceeding will also impact new entrant small broadband providers, potentially negating any value or benefit to improving the Designated Entity program as proposed by the FCC in October 2014. See *Updating Part 1 Competitive Bidding Rules, et al.*, Notice of Proposed Rulemaking, WT Docket No. 14-170, FCC 14-146, 29 FCC Rcd 12416 (2014).

We sincerely appreciate your consideration.

Respectfully Submitted,

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